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10   UNITED STATES DISTRICT COURT

11   NORTHERN DISTRICT OF CALIFORNIA

12   SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,   ) CR 14-00651 TEH
)
14   Plaintiff,   ) GOVERNMENT'S SENTENCING
) MEMORANDUM
15   v.   )
) Date: March 14, 2016
16 LUIS GONZALO CAUICH CARBAJAL,   ) Time: 2:30 p.m.
)
17   Defendant.   ) Hon. Thelton E. Henderson
)
18

19   **INTRODUCTION**

20   The United States respectfully requests that this Court accept the plea agreement submitted by

21 the parties under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. On, March 14, 2016, the

22 defendant, Luis Gonzalo Cauich Carbajal, will stand before the Court to be sentenced following his plea

23 to Count Three of the Indictment, charging receipt of child pornography, in violation of Title 18, United

24 States Code, Sections 2252(a)(2). The defendant pled guilty on December 7, 2015, and he has been in

25 continuous custody since November 12, 2014.

26   The parties have agreed that the proper disposition in this case is a term of imprisonment

27 between 120 and 210 months, a supervised release term of 10 years to follow (with conditions to be

28 determined by the Court and including the conditions agreed to by the parties), a fine to be determined

1   by the Court, and a mandatory special assessment of $100. It is the government's view that a sentence

2   of 210 months is sufficient, but not greater than necessary, to achieve the sentencing goals of 18 U.S.C.

3   § 3553(a). 210 months is a sentence at the low-end of the Guidelines range for the Adjusted Offense

4   Level and Criminal History Category for this defendant.

5   The government moves at this time to reduce the defendant's Adjusted Offense Level for

6   acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(b). Based on this motion, the government

7   agrees with the Probation Officer that the defendant's Total Offense Level is 37 and that his Criminal

8   History Category is I. The government also will move to dismiss Counts One and Two of the

9   Indictment at the time of sentencing.

10   **THE DEFENDANT'S OFFENSE CONDUCT**

11   On October 7, 2014, an individual found a blue cell phone on the ground near a taco truck in

12   Richmond, California. Presentence Report ("PSR") at ¶ 6. After opening the phone in an attempt to

13   determine the phone's owner, the individual saw photos of child pornography, and turned the phone

14   over to the police. *Id.* at ¶¶ 6-8. The police conducted an investigation to determine the owner's

15   identity, and that investigation ultimately led them to this defendant. *Id.* at ¶¶ 7-13. As part of that

16   initial investigation, law enforcement agents examined the phone's contents, and found over 2,000 chat

17   messages in Spanish, in which images of a young naked girl, and an older naked woman, were

18   exchanged between this defendant and another phone number between September and October of 2014.

19   *Id.* at ¶¶ 8-12. The other phone number originated in Mexico, and the FBI opened a case with the

20   assistance of the FBI attaché in Mexico City, Mexico, in order to learn the owner's identity of the other

21   phone number.[1] *Id.* at ¶ 12.

22   On November 10, 2014, Richmond Police Department officers arrested the defendant. *Id.* ¶ 13.

23   Officers seized a second cell phone from the defendant's person at the time of his arrest. *Id.* at ¶ 13.

24   Officers searched that second phone and found a third-party text message application, "WhatsApp." *Id*.

25   Officers examined the text messages sent via the "WhatsApp" program, and they learned that the

26

27   [1] The Mexican authorities proved unwilling or unable to assist the FBI in locating the young girl
    depicted in the nude photos found on the defendant's phones, and thus, the United States cannot
28   determine the victim's physical location. The government was not able to meet with the young girl or
    the girl's mother.

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1   defendant's phone contained text messages, photos, and videos, all to the same number as found on the

2   first phone – the number that originated in Mexico. *Id*. The nature of the text messages found on the

3   second phone indicated that the defendant communicated via "WhatsApp" with a female. *Id*. Within

4   the "WhatsApp" text messages, officers found numerous images and videos of child pornography, in

5   addition to clothed and nude images of an older female. *Id*. at ¶¶ 12-13

6   The child pornography videos found on the second phone depicted the same young girl as

7   depicted in the child pornography found on the first, "lost" phone. *Id.* at ¶ 14. The videos depicted the

8   young girl masturbating, and there were also numerous photos of the victim masturbating and displaying

9   her vagina for the camera. *Id*. The FBI identified the following videos on the second phone:

10   1.   Video #1 was sent from the phone with the Mexican phone number to the defendant on

11   October 20, 2014, and depicts the young victim wearing a t-shirt while she is masturbating for the

12   camera and talking. *Id.*

13   2.   Video #2 was sent from the phone with the Mexican phone number to the defendant on

14   October 22, 2014, and depicts the victim wearing only a black t-shirt and talking and masturbating for

15   the camera. *Id*.

16   3.   Videos #3 and #4 were sent from the phone with the Mexican phone number to the

17   defendant on October 26, 2014, and they depict the victim completely naked and masturbating for the

18   camera. *Id*.

19   4.   Videos #5 and #11 were sent from the phone with the Mexican phone number to the

20   defendant on October 26, 2014 and they depict the victim completely naked and masturbating for the

21   camera. Video #5 also depicts the victim urinating while being filmed. *Id*.

22   5.   Videos #6 and #7 were sent from the phone with the Mexican phone number to the

23   defendant on October 27, 2014, and video #8 was sent on October 29, 2014, All three videos depict the

24   victim completely naked and masturbating for the camera. *Id*.

25   6.   Video #9 was sent from the phone with the Mexican phone number to the defendant on

26   November 5, 2014, and depicts the victim completely naked and posing in sexually suggestive positions

27   for the camera while the camera focuses on her vagina. *Id*.

28   7.   Video #10 was sent from the phone with the Mexican phone number to the defendant on

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1   November 9, 2014, and Videos #12 and #13 were sent on November 10, 2014 (the same day the

2   defendant was arrested). They all depict the victim completely naked and masturbating for the camera.

3   *Id.*

4   On November 10, 2014, after being arrested, the defendant consented to a recorded interview by

5   the Richmond Police. *Id*. at ¶ 15. During that interview, the defendant admitted owning the first, "lost"

6   phone found by the passerby, and admitted to owning the phone police seized from him that day. *Id*. at

7   ¶ 16. The defendant readily identified the individuals depicted in all the photos found on his phones,

8   and he identified the older woman as his "wife," and the children depicted in photos as "her two

9   children, a boy and a girl." *Id*. Police later found out that the woman the defendant identified as his

10 wife is actually his girlfriend, because the defendant was already married to someone else. *Id*. The

11 young girl that the defendant identified as the older woman's daughter is the young girl depicted in all

12 the child pornography. *Id*.

13   When first asked how the defendant came to receive all the child pornography of the young girl

14 on his two phones, the defendant lied. *Id.* at ¶ 17. He first told police that the young girl was "sick,"

15 and that something was "wrong with her vagina," and he wanted an "update" on the victim to "confirm

16 she was doing well." *Id*. at ¶ 17-18. When the police officers confronted the defendant with the fact

17 that none of the text messages discussed the young victim's illness, the defendant changed his story. *Id.*

18 at ¶ 20. The defendant then said that while he initially asked for the photos because he was concerned

19 about the young girl's "illness," he now said that "over time, he enjoyed the photos of the young girl."

20 *Id*. He continued to state that when he viewed the photos he became excited, but in the back of his mind

21 he realized that the young girl was his "daughter." *Id*. When asked if the images of the young girl made

22 him "horny," the defendant replied, "yeah, I honest, yeah." *Id*. The officers asked the defendant about

23 the woman's comment to him about being the young girl's "first," and the defendant replied that the

24 statement referred to him being the first person to have sex with the victim. *Id*. at ¶ 21.

25   On November 13, 2014, the defendant was interviewed by the FBI. *Id*. at ¶ 22. The defendant

26 again identified the young victim depicted in the child pornography videos and images. *Id*. When

27 confronted with the fact that the text message communication between the defendant and the woman in

28 Mexico (the woman the defendant originally described as his "wife") made no mention of the victim's

1 "illness," the defendant admitted to asking the woman for the videos and images of child pornography.

2 *Id*. In the interview, the defendant admitted to receiving 200 images and 20 videos depicting the young

3 girl masturbating. *Id*. at ¶ 23. The defendant stated that the victim was not actually his daughter, but

4 was one of the woman's four children. *Id*. The defendant stated that the victim was 10 years old, and

5 described the small town in Mexico where the woman and her children lived. *Id*.

6   The videos found on the second phone also depict the young girl naked and masturbating. *Id*. at

7 ¶ 26. In the videos, it appears that the older woman is directing the young girl. *Id*. The young girl can

8 be heard saying in Spanish, "Daddy this is for you. I love you very much. I want you to play with my

9 vagina (slang)." *Id*. Many of the other videos found on the second phone include videos such as the one

10 described above.

11 <div align="center">**DISCUSSION**</div>

12 **I.   The Defendant's Sentencing Guidelines Calculation.**

13   As set forth in the PSR, the Sentencing Guidelines calculation for the defendant's offense level is

14 as follows:

15   <u>Count Three: Receipt of Child Pornography</u>

a.	<u>Base Offense Level</u>: (U.S.S.G. §§ 1B1.2(a), 1B1.3(a), and 2G2.1(a))		32
b.	<u>Specific Offense Characteristics</u> (U.S.S.G. § 2G2.1(b)(1)(A)) (Offense involved a minor not yet 12 years old)		+4
c.	<u>Specific Offense Characteristics</u> (U.S.S.G. § 2G2.1(b)(2)(A)) (Offense involved commission of a sexual act or sexual contact)		+2
d.	<u>Specific Offense Characteristics</u> (U.S.S.G. § 2G2.1(b)(6)(B)(i)) (Offense involved the use of a computer)		+2
e.	<u>Acceptance of Responsibility</u> (U.S.S.G. §§ 3E1.1(a) and (b))		-3
f.	<u>Adjusted Offense Level</u>:		<u>37</u>

27   At Adjusted Offense Level 37 and Criminal History Category I, the Guidelines range for this

28 defendant is 210 – 262 months. PSR ¶ 84. However, pursuant to the terms of the plea agreement, the

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1   defendant is authorized to seek a variance down to 120 months. The government is bound by the low-

2   end of the guidelines range. Thus, the Guidelines range in this case is 120 – 210 months.

3   **II.   Plea Agreement**

4   The plea agreement contemplates a sentence of 120-210 months imprisonment, 10 years of

5   supervised release (with conditions to be fixed by the Court), a fine to be determined by the Court, a

6    $100 special assessment. Dkt. No. 33. In addition to the supervised release conditions fixed by the

7   Court, the parties agree that the defendant should be subject to the following search conditions:

8   Special Condition (Searches)

9   The defendant shall submit his person, residence, office, vehicle, or any
                    property under his control to a search. Such a search shall be conducted by a United
10   States Probation Officer or any federal, state, or local law enforcement officer at any time
                    with or without suspicion. Failure to submit to such a search may be grounds for
11   revocation; the defendant shall warn any residents that the premises may be subject to
                    searches.
12

13   Special Condition (Limitations on use of Internet-Connected Devices)

14   The defendant shall allow the Probation Officer or designee to conduct
                    random inspections, including retrieval and copying of data from any
15   computer, telephone, or other internet-connected device that the defendant
                    possesses or has access to, including any internal or external peripherals or
16   electronic storage device. The defendant shall allow the temporary
                    removal of any such devices for a more thorough inspection, and the
17   defendant shall not use or possess any data encryption techniques or
                    programs. The defendant shall not access or use any file-sharing P2P
18   network or software without the consent of the Probation Officer. The
                    defendant shall not use "WhatsApp" or any other third-party text
19   messaging applications.

20   The Probation Officer concurs in the parties' sentencing Guidelines calculation, and recommends a mid-

21   range sentence of 168 months, and concurs with the parties' recommendation of a 10 year term of

22   supervised release and the $100 special assessment.

23   **III.   Section 3553(a) Factors**

24   "The overarching statutory charge for a district court is to impose a sentence sufficient, but not

25   greater than necessary" to achieve the goals of section 3553(a). *United States v. Carty*, 520 F.3d 984,

26   991 (9th Cir. 2008) (internal quotations omitted). In sentencing the defendant, this Court must consider

27   all of the directives set forth in Title 18, United States Code, Section 3553(a). *See United States v.*

28   *Booker*, 543 U.S. 220 (2005). To start, the Court must consider the correctly calculated Guidelines

1 range. *Id*. However, the Court may not presume that a sentence within the Guidelines range is

2 reasonable because the Guidelines are one among the several Section 3553(a) factors that courts are

3 directed to consider in arriving at an appropriate sentence. *Id*. These goals include the need for the

4 sentence imposed to reflect the seriousness of the offense and provide just punishment; to afford

5 adequate deterrence to criminal conduct; to protect the public from further crimes from the defendant;

6 and to provide the defendant with needed educational or vocational training, medical care, or other

7 correctional treatment. 18 U.S.C. § 3553(a).

8   The government believes that a sentence of 210 months—which is the high end of the range

9 agreed to by the parties but the low end of the Guidelines—is the proper disposition in this case and is

10 sufficient, but not greater than necessary, to achieve the goals of section 3553(a).

11   With respect to the nature and circumstances of the instant offense, the images and videos the

12 defendant received are vile beyond what one would hope are the limits of most human imagination. The

13 videos and images captured a real child, only 10 years old, who we can only hope has been removed

14 from the horrible home life she experienced. And the defendant was fully aware of the age of the girl,

15 and of the fact that the girl's *mother* filmed these images and videos and sent them to the defendant at

16 the defendant's request.

17   Any defense argument that these videos and images were not created by the defendant and that

18 therefore the defendant is not as culpable as the mother fails to appreciate the gravity of the direct and

19 indirect impact of the defendant's criminal conduct. With the aid of the girl's mother, the defendant

20 exploited a vulnerable child by requesting and receiving photographs and videos of the girl engaged in

21 masturbation and lasciviously displaying her genitals. Because this victim lives in Mexico, law

22 enforcement has not yet been able to locate her to obtain a victim statement. In fact, it appears that the

23 Mexican federal law enforcement agency will not work with the FBI to locate and remove the girl from

24 her deplorable living conditions. However, it is very likely that this girl has suffered psychological and

25 potentially physical harm as a result of the defendant's actions of continually requesting these videos

26 and images. Moreover, the videos in which the victim talks to the camera and addresses the defendant

27 while masturbating are disgusting and repulsive. This conduct calls for the longest sentence this court

28 may impose. A sentence of 210 months is an appropriate punishment given the heinous nature of the

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1   defendant's crimes, and it is not greater than necessary to punish him for his involvement in the repeated

2   abuse of that poor young girl.

3   With respect to the history and characteristics of this defendant, the historical record makes clear

4   that this defendant has the characteristics of a budding sexual predator, a callous and remorseless

5   exploiter of children, and a liar. As described above, the defendant has demonstrated an insatiable

6   demand for child pornography. The defendant received over 200 images and 20 videos of child

7   pornography, all of the same 10 year old girl, and all in a very short period of time of only several

8   months. Although the defendant has received a reduction for acceptance of responsibility, the defendant

9   chose not to issue an apology. And finally, the defendant's story about why he received the large

10 number of child pornography changed. First, he said that it was because the girl was "sick." Then, only

11 when confronted with the overwhelming evidence showing his guilt, did the defendant finally admit that

12 he asked for the pictures and videos. Additionally, it is worth noting that there is nothing in the

13 defendant's background that would hint at the horrific crimes the defendant would commit. PSR, ¶¶ 54-

14 66. This "normal" upbringing" makes the defendant's crimes that much more shocking.

15   With respect to the achieving the goals of sentencing, the kinds of sentences available, the need

16 to afford adequate deterrence to criminal conduct, and the need to protect the public from further crimes

17 of the defendant, the defendant has pled guilty to Count Three of the indictment, and did so in a timely

18 fashion. For that reason, the government moves for the third point for acceptance of responsibility and

19 has agreed to dismiss the currently pending charges of production of child pornography and possession

20 of child pornography, violations of Title 18, United States Code, Sections 2251(c)(2)(B) and

21 2252(a)(4)(B). However, the defendant—and future defendants—must be deterred from using the

22 Internet to exploit young, vulnerable victims, including those in foreign countries who may be difficult

23 to locate and without the opportunity to give voice to the harm that they have suffered. A sentence of

24 210 months would deter the defendant, and those who would engage in similar conduct, from trying to

25 exploit children, regardless of where they are located throughout the world. The government's

26 recommended sentence is at the low end of the Guidelines and it accounts for the defendant's lack of

27 any other criminal history.

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1 **IV. CONCLUSION**

2   In full consideration of the 3553(a) factors and the goals of sentencing, the government

3 respectfully requests that the Court accept the plea agreement of the parties and sentence the defendant

4 to a 210 month term of imprisonment, a supervised release term of 10 years to follow (with conditions to

5 be determined by the Court and including the search condition agreed to by the parties), a fine to be

6 determined by the Court, and a mandatory special assessment of $100. As noted in the PSR, "[t]he

7 probation officer has not identified any factors that would warrant a departure from the applicable

8 sentencing guidelines range." PSR, ¶ 99. A sentence at the low-end of the applicable guidelines range

9 is deserved.

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11   Respectfully submitted,

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13   BRIAN J. STRETCH
                      Acting United States Attorney

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15 Date: February 29, 2016   _____/s/_____
                      MICHAEL MAFFEI

16   Assistant United States Attorney

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